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The Practice of Shared Responsibility in relation to Extraterritorial Refugee Protection

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The Practice of Shared Responsibility in relation to Extraterritorial Refugee Protection

Niels Frenzen[*]

1. Introduction

This chapter reviews three case examples involving transferring and receiving states where first, migrants traveling by sea to a state were intercepted, and transferred by that state (transferring state) to another state (receiving state); and second, a reviewing body, a court, treaty body or United Nations (UN) agency, applying a particular legal regime, issued a decision or informal legal opinion as to the rights of the affected migrants and the obligations of the states involved.

Each case example involves an extraterritorial migration control or a rescue operation where migrants were transferred by one state to a receiving state (section 2). Two of the three case examples also involve joint processing of the migrants in the receiving state. The transfers implicate the *non-refoulement* obligation,[1] both in regard to the transfer of the migrants to the initial receiving state, and in regard to possible chain or indirect *refoulement* to subsequent receiving states.

This chapter discusses the processes used by the reviewing bodies to consider the *non-refoulement* obligation and the responsibility of the transferring and receiving states. The chapter focuses only on the harms to the affected migrants and questions of responsibility occurring as a result of the transfer of the migrants to the receiving states and, where it occurred, the subsequent joint processing of the transferred migrants. The chapter therefore does not discuss issues arising under the Search and Rescue Convention (SAR) or Convention for the Safety of Life at Sea

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[1] See Chapter 19 in this volume, M. den Heijer, 'Refoulement', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

(SOLAS),[2] or other questions relating to the pre-transfer interception or rescue of migrants at sea.[3]

The chapter reviews the primary rules at issue in the three case examples, specifically the Convention Against Torture (CAT);[4] the European Convention on Human Rights (ECHR);[5] and the UN Refugee Convention (Refugee Convention) in section 3,[6] as well as the relevant secondary rules (section 4). The chapter then discusses the processes carried out by the reviewing bodies, the UN Committee Against Torture (UNCAT, Committee Against Torture or Committee); the European Court of Human Rights (ECtHR); and the United Nations High Commissioner for Refugees (UNHCR) in section 5. The review processes varied from formal judicial review in the case of the ECtHR, to quasi-judicial review by the Committee Against Torture, to monitoring and reporting by the UNHCR. The chapter concludes with a discussion of the reasons for which each of the reviewing bodies was unable to make formal determinations of shared state responsibility under their respective legal regimes.

2. Cases

2.1 The Marine I case (Spain and Mauritania)

In January 2007, the *Marine I*, a cargo ship carrying over 350 Asian and African migrants became disabled in international waters near Mauritania. Spanish forces rescued the disabled ship. After diplomatic negotiations and a payment of 650,000 euros to Mauritania, Mauritania allowed Spain to disembark the migrants in Mauritania. Spanish national police maintained custody of the disembarked migrants on Mauritanian territory, and proceeded to identify and

[2] International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, in force 22 June 1985, 1405 UNTS 97 (SAR Convention); International Convention for the Safety of Life at Sea, London, 1 November 1974, in force 25 May 1980, 1184 UNTS 2 (SOLAS).
[3] See Chapter 17 in this volume, S. Trevisanut, 'Search and Rescue Operations at Sea', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), ___.
[4] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (CAT).
[5] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).
[6] Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 137 (Refugee Convention).

process the rescued migrants. African migrants regardless of nationality were transferred by Spain to Guinea; some Asian migrants were transported to Spain where asylum claims were made; but most Asian migrants were repatriated by the International Organization for Migration (IOM) to their countries of nationality. A group of 23 Indian migrants resisted repatriation due to a fear of harm if returned to Kashmir and remained detained for several months in Mauritania. A complaint against Spain was filed with the Committee Against Torture, alleging violations of several provisions of the CAT, including the Article 3 *non-refoulement* obligation.[7]

2.2 The Hirsi v. *Italy case (Italy and Libya)*

In 2007, Italy and Libya signed a series of migration agreements which included provisions for joint maritime surveillance and search and rescue operations in international and Libyan territorial waters. In 2009 Italy conducted nine push-back operations where over 400 migrants were intercepted in international waters and transferred to Libya where they were detained by Libyan authorities.[8] A case on behalf of some of the intercepted migrants was commenced against Italy before the ECtHR alleging violations of several provisions of the ECHR, including the prohibition against torture under Article 3.[9] The Article 3 prohibition of torture includes a *non-refoulement* obligation.[10]

2.3 Australia's 'Pacific Solution Mark II' (Australia and Papua New Guinea/Nauru)

In 2012, Australia resumed a modified version of an offshore processing practice which it had ended in 2008. The new practice, 'Pacific Solution Mark II', provided for the transfer to Nauru and Papua New Guinea (PNG) of migrants who reach Australia by boat, or who are intercepted at sea trying to reach Australia, and was implemented pursuant to terms of newly negotiated

[7] *J.H.A., on behalf of P.K. et al.* v. *Spain*, Communication No. 323/2007, UNCAT, UN Doc. CAT/C/41/D/323/2007 (2008) (*Marine I* case).
[8] Human Rights Watch reported that some of the Italian push-back operations were coordinated by the EU border control agency Frontex. HRW, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', Report, 21 September 2009; *Hirsi Jamaa and others* v. *Italy*, App. No. 27765/09 (ECtHR, 23 February 2012) (*Hirsi*), paras. 13-14, 38.
[9] *Hirsi*, ibid.
[10] See *Soering* v. *the United Kingdom*, App. No. 14038/88 (ECtHR, 7 July 1989).

diplomatic agreements with the two receiving countries.[11] The agreements included provisions which purported to place responsibility on Nauru and PNG to adjudicate refugee claims under their national laws.[12] The UNHCR, acting pursuant to its supervisory role under Article 25 of the Refugee Convention, conducted monitoring visits to Nauru and PNG, reviewed the bilateral agreements, and issued reports and statements addressing the states' obligations under the Refugee Convention.

3. Primary rules

The underlying obligation in each of the three case examples is the *non-refoulement* principle. Related obligations are also addressed by the reviewing bodies – such as the prohibition of collective expulsion; the right to an adequate remedy by the ECtHR; and the right to fair refugee status determinations by the UNHCR. The *non-refoulement* obligation is widely accepted to be the cornerstone of refugee protection. While there is not universal agreement that *non-refoulement* rises to the level of *jus cogens*, it is generally considered to be part of customary international law, meaning all states are bound by the principle even if they are not a signatory to a particular convention containing the *non-refoulement* principle.[13] The CAT, the Refugee Convention, and the ECHR each contain the *non-refoulement* obligation and states parties are

[11] Prior to commencement of the practice, Australia tried to implement an offshore processing agreement with Malaysia, but the practice was halted by the Australian High Court which determined that the designation of Malaysia as an offshore processing location was invalid under provisions of the Australian Migration Act in effect at the time, which required that access to fair asylum procedures be guaranteed by law in the offshore processing location. *Plaintiff M70/2011* v. *Minister for Immigration and Citizenship* [2011] HCA 32. The High Court determined no such provisions existed in Malaysia, since it was not a signatory to the Refugee Convention and did not have equivalent forms of protection in domestic law. The Parliament repealed the statutory provisions on which the High Court relied to strike the agreement in 2012.

[12] Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer To and Assessment Of Persons in Nauru, and Related Issues, 29 August 2012, superseded by Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, 3 August 2013; Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer To and Assessment Of Persons in Papua New Guinea, and Related Issues, 8 September 2012, superseded by Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer To, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues, 6 August 2013. Full text of 2013 Memoranda available from the Australian Department of Foreign Affairs and Trade at **Error! Hyperlink reference not valid.**http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Pages/people-smuggling-and-trafficking.aspx (last accessed in June 2015).

[13] See G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (Oxford University Press, 2007), 218.

bound by the respective conventions. Applying the question of primary rules to the three examples above: Mauritania and Spain have both ratified the CAT, albeit with different reservations and declarations; Italy, not Libya, is a state party to the ECHR; Australia, Nauru, and Papua New Guinea have each ratified the Refugee Convention.

The *non-refoulement* obligation does not directly require a transferring state to ensure that a receiving state does not subject a transferred person to torture or inhumane treatment. Instead, the *non-refoulement* obligation requires the transferring state to assess whether a person is likely to be tortured or subjected to inhumane treatment in the receiving state and, additionally, in case the receiving state might transfer the person to a third state, assess whether the receiving state has adequate procedures to prevent further chain *refoulement* to a third state where torture or inhumane treatment is likely. If torture or inhumane treatment in the receiving state is likely or, if chain *refoulement* might occur and adequate procedures in the receiving state do not exist to assess possible harm in such a chain *refoulement* situation, the obligation prohibits the transfer of the person.

As is the case with other international human rights conventions, a state's responsibility can be triggered when the state exercises jurisdiction over a territory or a person.[14] Jurisdiction will typically exist when a state has effective *de jure* or *de facto* control over a territory or person.

If jurisdiction exists, the determination whether a particular state has a *non-refoulement* obligation requires that the actions or possible actions of both the transferring state and receiving state(s) be assessed and questions relating to possible shared responsibility may under some circumstances be considered. In the absence of a chain *refoulement* concern,[15] an assessment of the *non-refoulement* obligation of a transferring state requires an assessment of whether harm is likely to occur in a receiving state. The *non-refoulement* obligation of the transferring state in this circumstance is not shared with the receiving state. Should *refoulement* occur, with or without a violation of the transferring state's *non-refoulement* obligation, the receiving state would have an obligation not to harm the person who has been transferred, but this obligation not to harm on the

[14] See e.g. International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR), Article 2 (obligating states to apply rights to 'all individuals within its territory and subject to its jurisdiction'); Article 2 CAT, n. 4, (obligating states to prevent acts of torture to persons 'in any territory under its jurisdiction'); Article 1 ECHR, n. 5, (obligating states to secure rights 'to everyone within their jurisdiction'.)

[15] See Chapter 19 in this volume, Den Heijer, 'Refoulement', n. 1, ___.

part of the receiving state is independent of the *non-refoulement* obligation of the transferring state.[16]

In chain *refoulement* cases, even if harm is not likely to occur in the initial receiving state, the *non-refoulement* obligation still requires an assessment of whether there is an adequate procedure in place in the initial receiving state to consider an individual's claim for *non-refoulement* protection if harm is likely to occur in a subsequent receiving state further down the 'chain'.[17] When chain *refoulement* exists, the actions or likely actions of three or more states must be considered. Chain *refoulement* cases could raise shared responsibility questions if, for example, two transferring states in the chain acted together to return a person to a receiving state where harm was likely to occur. In the absence of such collaboration, it is more likely that responsibility would be assessed on the basis of each transferring state's independent *non-refoulement* obligation.

Shared responsibility questions could also arise when two states concurrently exercise effective control over a person. The ECtHR has recognised the concurrent exercise control over a person outside of the *non-refoulement* context.[18] The UNHCR has done so in regard to the Refugee Convention.[19] Such a situation is also contemplated by UNCAT General Comment No. 2, which provides that a state's jurisdiction under the CAT exists in 'any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control'.[20] While the CAT's *non-refoulement* prohibition does not contain a territorial limitation, UNCAT General Comment No. 2 has interpreted references to 'territory' in other provisions of the CAT, e.g. the Article 2 obligation to take measures to prevent torture, to extend to prohibited acts committed in 'other

[16] One possible exception where shared responsibility for a violation of a *non-refoulement* obligation might occur in this context would be in a situation where the receiving state assisted the transferring state in transferring a person to the receiving state with the purpose of harming the person in the receiving state.

[17] See, e.g., UNCAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), UN Doc. A/53/44, Annex IX (21 November 1997), which makes clear that the prohibition of return to 'another state' where torture is likely refers both to the state to which a person may initially be transferred as well as to any other state to which that person may subsequently be transferred, i.e. to the chain *refoulement* situation; see also, *M.S.S.* v. *Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011).

[18] See *Issa and others* v. *Turkey*, App. No. 3821/96 (ECtHR, 16 November 2004), para. 71.

[19] See discussion in section 4.3.

[20] UNCAT General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (24 January 2008), para. 16.

areas over which a state exercises factual or effective control.'[21] In such cases two states with concurrent jurisdiction over a person would share the *non-refoulement* obligation.

4. Secondary rules

Each of the three case examples deals with situations involving possible chain *refoulement* and the *non-refoulement* obligations of the transferring and receiving states. The case examples therefore also raise questions of state responsibility under so-called secondary rules in the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[22]

None of the three case examples presents the most basic *refoulement* scenario involving the transfer of a person from one state to another. In this basic scenario the *non-refoulement* obligation requires the transferring state to make an assessment of whether torture or inhumane treatment is likely to occur in the receiving state. The transferring state violates its obligation when it transfers a person without conducting an adequate assessment of risk or when it transfers a person despite knowledge that there is a risk of likely harm. The transferring state would violate its *non-refoulement* obligation regardless of whether the transferred person was or was not harmed upon transfer to the receiving state. Of the three case examples, the *Hirsi* case is closest to the basic scenario, but differs in that the persons initially returned by Italy to Libya in violation of Italy's *non-refoulement* obligation were then subject to possible chain *refoulement* to third countries. The principle of complicity in the ARSIWA would have no bearing on this basic *refoulement* scenario because the transferring state would violate its obligation even in the absence of any assistance or collaboration on the part of a second state, the receiving state.

Two of the case examples, the *Marine I* case and 'Pacific Solution Mark II' example, present more complicated *refoulement* scenarios which implicate the responsibility of one state in connection with the actions of one or more other states, and therefore the ARSIWA, specifically Article 16 ARSIWA, do pertain. The *Marine I* case presents a situation where Spain exercised

[21] Ibid., para. 16.
[22] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

control over persons detained in Mauritania, with the awareness and support of Mauritania demonstrated by a diplomatic agreement. The *Marine I* case presents a situation where two states may have exercised joint control over persons who were subject to possible *refoulement*. The Pacific Solution example presents a scenario with some similarities, where persons were transferred from Australia to either Nauru or Papua New Guinea pursuant to diplomatic agreements. This example presents a situation where two states have exercised joint control over persons facing *refoulement* in the absence of adequate assessment procedures. The Pacific Solution example also presents a strong example of one state, Australia, providing significant aid or assistance to two other states in a manner which strongly indicates a violation of the *non-refoulement* obligation. The *Marine I* case and the Pacific Solution example present situations of possible shared responsibility recognised by the ILC in its Commentary to Article 16 ARSIWA, in that each assisting state was likely 'aware of the circumstances making the conduct of the assisted State internationally wrongful' and that the assistance was 'given with a view to facilitating the commission of a wrongful act [*refoulement*]' and that the state has actually done so.[23] Additionally, in each of the two examples, all of the states are subject to identical *non-refoulement* obligations – in the *Marine I* case Mauritania and Spain have ratified the CAT, and in the Pacific Solution example each of the three countries are signatories to the Refugee Convention.[24]

The ILC Commentary to Article 16 ARSIWA recognises the *Monetary Gold* principle and the likely barrier it poses to admissibility of claims before an international court, if the determination of responsibility of one state requires the court to rule on the lawfulness of another state in the latter's absence and without its consent.[25] In the *Hirsi* case example, the *Monetary Gold* principle does not prevent the ECtHR from assessing Italy's responsibility in the absence of Libya. The ECtHR has stated that in *refoulement* cases, while the Court is required 'to assess the situation in the receiving country in the light of the requirements of Article 3[,] [i]n so far as any liability under the [ECHR] is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual

[23] ARSIWA Commentary, ibid., Commentary to Article 16 ARSIWA, paras. 4, 5.
[24] Ibid., para. 6.
[25] Ibid., para. 11. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19 (*Monetary Gold*).

to the risk of proscribed ill-treatment'.[26] Likewise, the *Monetary Gold* principle would not affect the informal review and advice provided by the UNHCR in the Pacific Solution example. The *Monetary Gold* principle could however prevent the Committee Against Torture from adjudicating the responsibility of Mauritania in the *Marine I* case, given that Mauritania has not made the necessary declarations to recognise the competence of the Committee to receive and consider communications alleging violations of the CAT by Mauritania, but the principle would not prevent the Committee from considering the responsibility of Spain as long as Spain's responsibility was not dependent on the wrongful conduct of Mauritania.[27]

5. The processes

5.1 UN Committee Against Torture: Marine I case

In May 2007, a complaint was submitted to the Committee Against Torture on behalf of 23 Indian migrants alleging violations of the *non-refoulement* and other provisions of the CAT. The complaint did not include allegations against Mauritania because Mauritania, even though a CAT signatory, has not recognised the competence of the Committee Against Torture to consider complaints filed by individuals.[28] At the time of the filing of the complaint, the migrants had been detained for approximately three months after having been disembarked from the disabled ship in Nouadhibou, Mauritania. While the Committee ultimately found the complaint to be inadmissible, before dismissing the case the Committee addressed and rejected Spain's argument that it could not be found to bear responsibility under the CAT because the actions at issue took place outside of Spanish territory and thus outside of Spanish jurisdiction.

Spain argued that Mauritania had explicitly authorised the temporary presence of Spanish security forces on Mauritanian territory.[29] Spain argued that it had complied with its international

[26] *Hirsi*, n. 8, para. 115.
[27] ARSIWA Commentary, n. 22, Commentary to Article 16 ARSIWA, para. 11.
[28] Article 22(1) CAT, n. 4.
[29] A total of 1,130 Spanish police officers were deployed to Mauritania during the mission, see Tribunal Supremo, No. de Recurso 548/2008, 17 February 2010 (4th Section, Fundamentos de Derecho).

obligations under the SOLAS and SAR Conventions, and that those obligations ended once the rescued migrants had been disembarked in Nouadhibou, described by Spain as a 'safe port'.[30]

The Committee rejected Spain's jurisdictional argument. Relying on its General Comment No. 2, the Committee noted that 'the jurisdiction of a state party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law' and that this 'must also include situations where a state party exercises, directly or indirectly, de facto or de jure control over persons in detention'.[31] The Committee found that Spain 'maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that [subsequently] took place in Nouadhibou'.[32] The Committee noted that Spain maintained 'constant de facto control' over the migrants in Nouadhibou 'by virtue of a diplomatic agreement concluded with Mauritania'.[33]

The Committee found the complaint inadmissible because the complainant, a Spanish human rights activist, did not have *locus standi*. Therefore the Committee could not proceed to address whether Spain violated its *non-refoulement* obligation by transferring the rescued migrants to various third countries.[34]

Even had the complaint against Spain been admissible, the Committee for competence reasons would still not have been able to address the issue of Mauritania's compliance with its obligations under the CAT.

While General Comment No. 2 does not address the situation where a state party explicitly authorises a second state to act within the state party's territory, it notes that a state party would be in violation of the CAT if it failed to adopt effective measures to prevent 'other persons acting in an official capacity' from participating in, or being complicit in, torture.[35] A state party would therefore be in violation of the CAT when it failed to adopt effective measures to prevent a second state, acting within the state party's territory and with the consent of the state party, from

[30] Article 3.1.9 SAR Convention, n. 2, (obligating rescued survivors to be delivered to a 'place of safety').
[31] *Marine I*, n. 7, para. 8.2; UNCAT General Comment No. 2, n. 20, para. 16.
[32] *Marine I*, ibid., para. 8.2.
[33] Ibid.
[34] Articles 3, 16 CAT, n. 4.
[35] UNCAT General Comment No. 2, n. 20, para. 17.

participating in, or being complicit in, torture. The General Comment observes that the CAT's provisions are interdependent, and as a result the obligation to prevent torture includes, among other things, taking measures to prevent *refoulement* and acts of cruel, inhuman or degrading treatment.[36] It follows that Mauritania would have been in violation of its obligations by failing to adopt effective measures to prevent Spanish authorities from subjecting the migrants to *refoulement*. The situation therefore presented an even stronger example of potential shared responsibility, given Mauritania's formal diplomatic consent to Spain's actions within Mauritanian territory. Spain presumably would not have been able to engage in any of the actions of *refoulement* without Mauritania's formal agreement.

Even in the absence of consent by a state party, the General Comment makes clear that where a state knows, or has reasonable grounds to believe, that acts of torture or ill-treatment are being committed by non-state officials, and the state party fails to prevent or investigate the acts, 'the state [party] bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts … The state [party's] indifference or inaction provides a form of encouragement and or de facto permission'.[37] States have a positive obligation to secure applicable rights to persons subject to their jurisdiction. This principle has been recognised elsewhere. The Human Rights Committee considering claims arising under the International Covenant on Civil and Political Rights (ICCPR) stated that 'a state party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party'.[38] The ECtHR has found that even 'where a contracting state is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation' such as a rebellion, '[t]he state in question must endeavour, with all the legal and diplomatic means available' to seek to comply with its obligations under the

[36] Ibid., paras. 1, 3.
[37] Ibid., para. 18.
[38] *Mohammed Alzery* v. *Sweden*, Communication No. 1416/2005, HRC, UN Doc. CCPR/C/88/D/1416/2005 (2006), para. 11.6. ICCPR, n. 14.

ECHR.[39] The rationale of these decisions supports the proposition that Mauritania shared responsibility for the actions carried out by Spain on its territory.[40]

5.2 ECtHR: Hirsi v. *Italy*

In May 2009, an application against Italy was filed with the ECtHR on behalf of 24 Eritrean and Somali migrants who had been intercepted by Italy in international waters in the Mediterranean Sea and returned to Libya during a push-back operation. The *Hirsi* applicants were not provided with an opportunity to make a claim to international protection before being transferred to Libyan authorities in Tripoli. The complaint alleged violations of Article 3 ECHR and Article 4 of Protocol 4,[41] prohibiting torture or inhuman treatment and collective expulsion of aliens, respectively.

Italy initially asserted that the events at issue did not fall within Italy's jurisdiction. While acknowledging that the events took place on board Italian military ships, Italy claimed that the interception of the migrant boats occurred in the context of a rescue in international waters which did not constitute a 'maritime police operation', and as a result Italy never exercised 'absolute and exclusive control' over the migrants necessary to trigger jurisdiction under the ECHR.[42] Italy further characterised the transfer of the migrants to Libya as an action conducted in accord with its bilateral agreements with Libya with which it was obligated to comply.

While jurisdiction under the ECHR is essentially territorial, the ECtHR has recognised instances of extraterritorial exercise of jurisdiction by a state.[43] It is an established principle that a vessel

[39] *Ilaşcu and others* v. *Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004), para. 333.
[40] While not relevant to the Committee's decision, while the Committee was considering the complaint, administrative litigation challenging Spain's actions within Mauritania was begun in the Spanish High Court and then appealed to the Spanish Supreme Court. The decisions by the Spanish national courts viewed the contested matters as being subject to the exclusive jurisdiction of Mauritania. *Marine I*, n. 7, para. 8.2, referencing the decision of the Spanish High Court, No. 3/2007, 12 December 2007 (la Sección Quinta de la Sala de lo Contencioso-Administrativo de la Audiencia Nacional); Supreme Court Decision (5th Section, Fundamentos de Derecho).
[41] *Hirsi*, n. 8, para. 3; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963, in force 2 May 1968, ETS 46.
[42] *Hirsi*, ibid., paras. 64, 65.
[43] See, e.g., *Al Saadoon and Mufdhi* v. *the United Kingdom (Admissibility)*, App. No. 61498/08 (ECtHR, 30 June 2009); *Medvedyev and others* v. *France*, App. No. 3394/03 (ECtHR, 29 March 2010); *Al-Skeini and others* v. *the*

operating on the high seas is subject to the exclusive jurisdiction of the flag state and the Italian military ships were therefore within Italian jurisdiction.[44] The ECtHR determined that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[45] The ECtHR rejected the claim that Italy could 'circumvent its "jurisdiction" under the Convention by describing the events at issue as rescue operations on the high seas'.[46] 'Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.'[47]

Libya is not a signatory to the ECHR and the ECtHR therefore did not consider any question of Libyan responsibility under the ECHR. But the ECtHR was compelled to assess the human rights situation in Libya in light of the Article 3 *non-refoulement* obligation, because Libya was the receiving country in the Italian push-back operation.[48] In this regard the ECtHR said that '[i]n so far as any liability under the [ECHR] is or may be incurred, it is liability incurred by [Italy], by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of the proscribed ill-treatment.'[49] The ECtHR concluded that Italy violated Article 3 by transferring the migrants to Libya without considering their claims to international protection, and thus exposing them to the risk of inhuman or degrading treatment within Libya. The ECtHR found an additional independent violation of Article 3 based upon the risk of chain *refoulement* from Libya to applicants' countries of origin.[50]

The ECtHR rejected Italy's assertions that it could avoid responsibility under the ECHR because the transfer of migrants was sanctioned by bilateral migration agreements with Libya and because Libya had an independent obligation to respect the human rights of the transferred migrants. Italy pointed to a provision in its 2008 Friendship Treaty in which Libya 'expressly undertook to

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United Kingdom, App. No. 55721/07 (ECtHR, 7 July 2011); *Jaloud* v. *the Netherlands*, App. No. 47708/08 (ECtHR, 20 November 2014).

[44] *Hirsi*, n. 8, paras. 76-78.

[45] Ibid., para. 81.

[46] Ibid., para. 79.

[47] Ibid., para. 81.

[48] See *Soering* v. *the United Kingdom*, n. 10.

[49] *Hirsi*, n. 8, para. 115.

[50] Ibid., paras. 137, 158. The Court also determined that Italy had violated Article 4 of Protocol 4, n. 41, the prohibition on the collective expulsion of aliens, and Article 13, denial of an effective remedy before a national authority, paras. 186, 207.

comply with the principles of the United Nations Charter and the Universal Declaration of Human Rights'[51] and to the fact that Libya had ratified the ICCPR and the CAT. Italy claimed it was entitled to presume that Libya was in compliance with its obligations to protect the migrants after their transfer.[52] The ECtHR rejected this argument stating that 'the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the [ECHR]'.[53] The ECtHR further said that

> Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States.[54]

The Court concluded its judgment by indicating that Italy should seek assurances from Libyan authorities regarding the protection of those applicants remaining in Libya. The Court acknowledged that its judgments were essentially declaratory in nature, but having determined that

> the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and being arbitrarily repatriated to Somalia and Eritrea … the Court considers that the Italian Government must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated.[55]

In a concurring opinion, Judge Pinto de Albuquerque criticised as inadequate the Court's instruction to the Italian government to 'obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the [ECHR] or

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[51] Trattato di amicizia, partenariato e cooperazione, *Gazzetta Ufficiale della Repubblica Italiana*, No. 40 of 18 February 2009 (Treaty of Friendship between Italy and Libya), Article 6. Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter); Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/RES/217A(III) (10 December 1948).
[52] *Hirsi*, n. 8, paras. 97, 98, 127.
[53] Ibid., para. 128.
[54] Ibid., para. 129.
[55] Ibid., paras. 209-211.

arbitrarily repatriated'.[56] Judge Pinto de Albuquerque stated that 'concrete measures' were required and expressed the opinion that the Italian government had 'a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy'.[57]

5.3 UNHCR: Australia's Pacific Solution Mark II

In 2012, Australia negotiated two bilateral agreements with Nauru and PNG. The agreements were both modified in 2013.[58] The agreements, commonly referred to as the 'Pacific Solution Mark II',[59] provided for the transfer of persons who 'have traveled irregularly by sea to Australia'[60] and persons intercepted at sea by Australian authorities in the course of trying to reach Australia by irregular means[61] to either Nauru or PNG, which are obligated under the agreements to accept the transferred persons.[62]

Australia's offshore processing practice has not been reviewed by an international court or treaty body. The UNHCR, however, exercising its monitoring and supervisory authority in regard to the Refugee Convention, issued several reports communicating its views regarding the transfer of persons by Australia to Nauru and PNG and the obligations of the three states under the Refugee Convention.

The UNHCR conducted several missions to Nauru and PNG to assess how the three countries were implementing their obligations under the Refugee Convention. The missions were conducted pursuant to UNHCR's supervisory role under Article 35 of the Refugee Convention and Article II of the Refugee Protocol.[63] The UNHCR conveyed findings and recommendations in public reports and correspondence on a range of issues, including the propriety of the use of

[56] Ibid., para. 211, and concurring opinion of Judge Pinto de Albuquerque, penultimate paragraph.
[57] Ibid., concurring opinion of Judge Pinto de Albuquerque, penultimate paragraph.
[58] See n. 12.
[59] See discussion in section 2.3.
[60] MoU Nauru-Australia, 2013, n. 12, para. 9(a); MoU PNG-Australia, 2013, n. 12, para. 10(a).
[61] MoU Nauru-Australia, ibid., para. 9(b); MoU PNG-Australia, ibid., para. 10(b).
[62] The 2012 MOU with Nauru included a reference to persons '*rescued* in the course of trying to reach Australia by irregular means', 2012 MoU Australia-Nauru, n. 12, para. 9(a). This language was removed from the 2013 MOU with Nauru.
[63] Protocol relating to the Status of Refugees, New York, 31 January 1967, in force 4 October 1967, 606 UNTS 267.

offshore processing in general; the adequacy of the offshore refugee status determination process; and the question of shared responsibility under the Refugee Convention.[64]

The agreements provided that Nauru and PNG as the receiving states would either 'make an assessment … of whether or not a transferee is covered by the definition of refugee'[65] or 'permit an assessment to be made'.[66] This latter language permitted Australia to conduct refugee assessments, though as the UNHCR observed, the intent of the agreements is for Nauru and PNG to assume full administrative responsibility for assessing refugee claims.[67]

The normal and preferred practice for processing refugee claims is for a Refugee Convention signatory state to assume responsibility for its obligations under the Convention and provide access to a fair in-country process for persons who arrive at the state's borders.[68] Offshore or extraterritorial processing in the UNHCR's view 'should normally only be pursued as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space' (internal quotation mark omitted).[69] Offshore processing arrangements should also be implemented in good faith and will not be considered by the UNHCR as an acceptable exception if the practice 'represents an attempt by an intercepting State to divest itself of responsibility and shift that responsibility to another State'.[70] The UNHCR questioned whether Australia's use of offshore processing under the circumstances was 'fully appropriate'.[71]

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[64] UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013', para. 22; UNHCR, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013', para. 16.
[65] MoU Nauru-Australia, 2013, n. 12, para. 19(b); MoU PNG-Australia, 2013, n. 12, para. 20(b).
[66] Ibid.
[67] Presumably this provision would also permit the UNHCR to conduct refugee status determinations. And while the UNHCR has conducted refugee status determinations in PNG since 2007 for asylum-seekers 'arriving spontaneously', UNHCR advised Australia that it would not conduct such determinations for asylum seekers transferred by Australia to PNG: 'The arrangements for asylum-seekers transferred from Australia to PNG may be distinguished as constituting essentially arrangements agreed by two Convention States and UNHCR has indicated that it would not have any operational or active role to play in their implementation.' UNHCR, 'Mission to Manus Island, Papua New Guinea, 15 to 17 January 2013', Findings and Recommendations, at 6; a similar statement by UNHCR was made in regard to persons transferred to Nauru. UNHCR, 'Letter regarding Nauru to Chris Bowen, Minister for Immigration and Citizenship of Australia', 5 September 2012, at 3.
[68] UNHCR, 'Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers', May 2013, para. 1.
[69] UNHCR, Letter regarding Nauru to Chris Bowen, n. 67, at 2, referencing UNHCR Protection Policy Paper, 'Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing', November 2010, para. 3.
[70] UNHCR Protection Policy Paper, ibid., para. 49.
[71] UNHCR, Letter regarding Nauru to Chris Bowen, n. 67, at 2; UNHCR, 'Letter regarding PNG to Chris Bowen, Minister for Immigration and Citizenship of Australia', 9 October 2012, at 2.

Assuming that an offshore processing arrangement has been implemented in good faith, and that it is a part of an acceptable burden sharing arrangement, the transferring state must still ensure that appropriate protection safeguards are in place in the receiving state.[72] The UNHCR questioned the adequacy of protection safeguards in both PNG and Nauru. The UNHCR noted that PNG, while a signatory to the Refugee Convention, maintained multiple reservations to the Convention, including reservations to Articles 26, 31 and 32 pertaining to freedom of movement; penalisation for illegal entry; and expulsion.[73] The UNHCR noted that PNG at the time of implementation had not developed domestic legislation to implement its obligations under the Refugee Convention; did not have a functional system for identifying and protecting refugees; and since 2007 had relied on the UNHCR to handle refugee claims made by spontaneously arriving asylum seekers.[74] The UNHCR noted that PNG was not a signatory to the CAT, and that neither PNG nor Nauru were signatories to the two Statelessness Conventions.[75] The UNHCR noted that Nauru had only recently acceded to the Refugee Convention and to the CAT, and that at the time of implementation of the agreement with Australia Nauru did not have asylum procedures.[76] As of 2013, while Nauru had implemented a legal framework for considering refugee claims, the UNHCR reported that it lacked officials with adequate experience to conduct fair and accurate assessments of claims.[77] As a result refugee claims were being processed by Australian officials seconded to Nauru.[78]

The UNHCR reported there was 'considerable ambiguity and confusion about operational aspects' of arrangements between PNG and Nauru and Australia.[79] The UNHCR noted in regard to PNG 'a significant and troubling lacuna in the legal arrangements that would be required to implement the provisions of the [agreement] and which [were] needed to ensure compliance with

[72] UNHCR Protection Policy Paper, n. 69, para. 43; UNHCR, Letter regarding Nauru to Chris Bowen, ibid., at 2.
[73] UNHCR Mission to Manus Island, n. 67, at 6, at footnote. 2.
[74] Ibid., at 6.
[75] UNHCR Monitoring Visit to Manus Island, PNG, 2013, n. 64, para. 50; UNHCR Monitoring Visit to the Republic of Nauru, 2013, n. 64, para. 40. Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117; Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.
[76] UNHCR, 'Mission to the Republic of Nauru, 3 to 5 December 2012', at 5, at footnote 2, and at 9; UNHCR, Letter regarding Nauru to Chris Bowen, n. 67, at 2.
[77] UNHCR Monitoring Visit to the Republic of Nauru, 2013, n. 64, paras. 27-32.
[78] UNHCR Mission to the Republic of Nauru, 2012, n. 76, at 5, at footnote 2, and at 9; UNHCR, Letter regarding Nauru to Chris Bowen, n. 67, at 2.
[79] UNHCR Mission to Manus Island, n. 67, para. 37; UNHCR Mission to the Republic of Nauru, 2012, ibid., para. 12.

applicable international law and protection standards'.[80] In regard to Nauru, the UNHCR expressed deep concern about 'uncertainty and delays in establishment' of refugee status determinations.[81]

The offshore processing agreements presented the question of whether Australia's responsibilities under the Refugee Convention ended upon transfer of the intercepted migrants to PNG and Nauru or, if they did not end, whether they changed in some fashion. Before any intercepted migrants are transferred to Nauru and PNG, it is clear that the migrants are under the *de jure* and *de facto* control of Australia. When such persons are received on the territory of Nauru and PNG pursuant to the terms of the agreements, the migrants are subject to the *de jure* control of Nauru and PNG, but, the UNHCR noted that Australia continued to exercise significant *de facto* control over the migrants in both PNG and Nauru.

The UNHCR took note of the language of the agreements which indicated that each state undertook to ensure that transferred persons are 'treated with dignity and respect and that relevant human rights standards are met'. Australia undertook to make sure that all persons entering the receiving states would be transferred or resettled elsewhere.[82] The UNHCR concluded that such undertakings indicated that the states 'accept[ed] that they have shared and joint legal responsibility for the protection of refugees identified in the processing arrangements'.[83]

Australia advised the UNHCR that it considered its legal responsibility for transferred persons to end, and shift to the receiving states once the transferred persons arrived in the receiving states.[84] The UNHCR rejected this view for several reasons, including the lack of competence and capacity on the part of PNG and Nauru to protect or process the persons being transferred by Australia. Given the lack of competence and capacity, the UNHCR stated that '[a]t best, we would see the transfers as a shared and joint legal responsibility under the Refugee Convention and other applicable human rights instruments'.[85] The UNHCR further rejected Australia's assertion that its legal responsibility ended upon transfer because 'the significant de facto control

[80] Mission to Manus Island, ibid., at 10.
[81] UNHCR Mission to the Republic of Nauru, 2012, n. 76, at 5, 10, 11.
[82] Ibid., para. 12(iii); UNHCR Mission to Manus Island, n. 67, para. 19.
[83] UNHCR, Letter regarding Nauru to Chris Bowen, n. 67, at 3; UNHCR, Letter regarding PNG to Chris Bowen, n. 71, at 3.
[84] UNHCR Mission to the Republic of Nauru, 2012, n. 76, at 4; Letter regarding PNG to Chris Bowen, ibid., at 3.
[85] Letter regarding PNG to Chris Bowen, ibid., at 3.

exercised by Australian officials and contractors [in PNG] reinforce[d] UNHCR's view that legal responsibility under international law for the care and protection of all transferees from Australia to PNG remain[ed] with both contracting states equally'.[86] In regard to Nauru, the UNHCR observed that Australian officials 'appeared to be in effective control of management of the [offshore processing centre]',[87] noting among other factors that '[a]pproval to enter the [centre] appears to be controlled by [Australian authorities] and not the Government of Nauru'.[88] The UNHCR noted 'confusion about lines of responsibility' in Nauru which was 'exacerbated by the absence of a regular presence of the Nauruan Government at the [centre] and the fairly high visibility (and level of control) by Australian officials'.[89] The existence of *de facto* control in both countries was further reinforced by the fact that Australia paid all costs associated with the offshore processing centres.[90] For these reasons, the UNHCR concluded that shared and joint legal responsibility existed under the Refugee Convention.

6. Conclusion

The primary rules in the three above case examples, enshrined in the CAT, ECHR, and the Refugee Convention, impose the *non-refoulement* obligation on the respective contracting states. Questions of shared responsibility for a violation of the *non-refoulement* obligation are unlikely to arise within the framework of the most basic act of *refoulement* where a transferring state transfers a person to a receiving state when the person is likely to face torture or when the transferring state fails to assess whether torture is likely to occur in the receiving state. Since the *non-refoulement* obligation does not directly require a transferring state to ensure that a receiving state does not torture a transferred person, the basic act of *refoulement* would not trigger shared responsibility in the absence of aid or assistance by the receiving state. Furthermore, the transferring state would violate the *non-refoulement* obligation once it transferred a person in the face of likely torture or without assessing the risk of torture, even if no harm were to come to the person in the receiving state.

[86] UNHCR Mission to Manus Island, n. 67, at 7-8.
[87] UNHCR Mission to the Republic of Nauru, 2012, n. 76, para. 31.
[88] Ibid.
[89] Ibid., at 6, 8.
[90] The PNG MOU states that Australia will develop a package of assistance in addition to the current development cooperation assistance being provided to PNG. 2013 MoU PNG-Australia, n. 12, para. 8.

But questions of shared responsibility will arise in cases which present more complicated *refoulement* factual situations, as shown by the case examples involving three situations of extraterritorial migration control operations and two of offshore processing. There is nothing in the primary rules applicable for the three case examples which prevents the respective reviewing bodies from considering questions of shared responsibility under the respective conventions other than first, the factual presence of a non-contracting state, as was the case with Libya in the *Hirsi* case example; or, second, the presence of a contracting state which had not consented to the competence of the reviewing body, as was the case with Mauritania in the *Marine I* case.

The refusal by the ECtHR to consider the shared responsibility of Italy and Libya due to Libya being a non-contracting state is consistent with the secondary rules, specifically the ILC Commentary to Article 16 ARSIWA, which recognises the *Monetary Gold* principle and the need for the presence and consent of a state in order for a reviewing court to make a determination of responsibility regarding that state. The Committee Against Torture in the *Marine I* case was prevented by provisions of its convention from considering the question of the shared responsibly of Spain and Mauritania. While Spain and Mauritania were CAT signatories, Mauritania had not made the necessary supplemental declaration to recognise the competence of the Committee to consider complaints pertaining to Mauritania. As with the *Hirsi* case, this procedural barrier within the CAT is consistent with the Article 16 ARSIWA Commentary and the *Monetary Gold* principle. The UNHCR, exercising its supervisory role over the Refugee Convention, was able to consider and find that there was shared responsibility on the part of Australia, Nauru, and PNG. This finding is consistent with the Commentary to Article 16 ARSIWA, requiring that the assisting state was ‘aware of the circumstances making the conduct of the assisted State internationally wrongful’ and that the assistance was ‘given with a view to facilitating the commission of a wrongful act’, which in this case was subjecting the affected migrants to likely or actual *refoulement*.